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In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 73-1452

STATE OF OREGON,

Petitioner,

v.

WILLIAM ROBERT HASS,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

BRIEF FOR RESPONDENT

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CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor

be deprived of life, liberty or property, without due process of law . . ."

United States Constitution, Amendment X:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

United States Constitution, Amendment XIV, Section 1:

"... (N) or shall any State deprive any person of life, liberty, or property, without due process of law. . ."

Constitution of Oregon, Article 1, Section 10:

"No Court shall be secret but justice shall be administered openly and without purchase completely and without delay and every man shall have remedy by due course of law for injury done him in his person, property or reputation."

Constitution of Oregon, Article 1, Section 12:

"No person shall be put in jeopardy twice for the same offense nor be compelled in any criminal prosecution to testify against himself."

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No. 73-1452

STATE OF OREGON,

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BRIEF FOR RESPONDENT

OPINIONS BELOW

The opinion of the Court of Appeals of the State of Oregon reversing and remanding Hass's burglary conviction (Petition for Certiorari, at 20-25) is reported at 13 Or. App. 368, 510 P.2d 852 (1973). The opinion of the Supreme Court of the State of Oregon affirming the decision of the court of appeals.

QUESTIONS PRESENTED

Question One

Does the Supreme Court of the United States have the power to compel a state to conform to federal law when state law is more restrictive against the prosecution than federal law?

Question Two

Is a mandate from the highest appellate court in the state in favor of a criminal defendant reviewable upon appeal by the state to the Supreme Court of the United States?

Question Three

May a state court allow a confession not admissible under the states case-in-chief to be excluded for impeachment purposes notwithstanding **Harris v. New York, 401 U.S. 222 (1971).**

STATEMENT OF THE CASE

Respondent accepts Appellant's Statement of the Case and Facts Materials to the Question Presented.

SUMMARY OF ARGUMENT OF QUESTION ONE

Even Courts that have overruled state laws and followed **United States v. Robinson,** 414 U.S. 218 (1973) and **Harris,** supra, have included verbage in their opinions that it is being done through "tradition", through "reasons of policy" or in order to end "confusion between state and federal law". Hawaii has rejected **Harris** and stated that Hawaii is not bound by the federal interpretation in areas where the state

interpretation is more restrictive. The Supreme Court of the United States has recognized such a principal as being valid in **Cooper v. California,** supra. The Supreme Court of the United States is therefore without power to review the decision of the Oregon Supreme Court in the instant case since there has been no federally protected right violated.

SUMMARY OF ARGUMENT OF QUESTION TWO

The State of Oregon has no standing to cause review of constitutional provisions, since the state is not a person whose rights are adversely affected by the operation of the mandate of the Supreme Court of the State of Oregon, nor is the State of Oregon claiming any deprivation of its rights under the Fifth or Fourteenth Amendment, but is seeking an abstract, academic opinion.

SUMMARY OF ARGUMENT OF QUESTION THREE

The opinion of the State of Oregon in **State v. Hass,** 13 Or. App. 368, 510 P.2d 852 (1973) properly distinguishes the facts from those in **Harris v. New York,** 401 U.S. 222 (1971).

ARGUMENT OF QUESTION ONE

The Supreme Court of the United States has held

that the states have power to impose higher standards on searches and seizures than required by the Federal Constitution. In **Cooper v. California,** 386 U.S. 58, 17 LEd 2nd 730, 87 S Ct. 788 the police had violated a state law regarding search and seizure. The California Supreme Court had held that such violation was harmless error under the California "hold-harmless statute". The Supreme Court of the United States determined the case solely on the propriety of the search under the Federal Constitution and held that a violation of a state statute would not be reviewable by the Supreme Court of the United States unless the conduct in the search itself was unreasonable under federal law. In arriving at this decision the high court in its majority opinion included the following language,

> "Our holding, of course, does not affect the states power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so, and when such state standard alone has been violated, the state is free without review by us, to apply its own state's harmless error rule to such errors of state law. There being no Federal Constitutional error here, there is no need for us to determine whether the lower court properly applied its state harmless error rule".

See also **Sibron v. New York,** 392 U.S. 40, 61, 20

LEd 2d 917, 88 S Ct 1889 (1967). The Oregon Supreme Court commented upon this rule in **State v. Florance,** 99 Or. Adv. Sh. 1997, 2007, 2008, 2009, with the following language,

> "If we choose, we can continue to apply this interpretation. We can do so by interpreting Article I, Section 9 of the Oregon Constitution Prohibition of Unreasonable Searches and Seizures as being more restrictive than the fourth amendment of the Federal Constitution, or we can interpret the fourth amendment more restrictively than interpreted by the United States Supreme Court."

In the **Florance** case the Supreme Court of Oregon overruled their previous decisions and followed the federal rule as set out in the **Robinson** case, supra, but gave reasons of policy for doing so,

> "The law of search and seizure is badly in need of simplification for law enforcement personnel, lawyers and judges * * *".
>
> "It is important for the guidance of law officers that the rule be as clear and simple as may be reasonably possible consistent with the constitutional rights of the individual".
>
> "Not adopting the rule of Robinson would add further confusion in that there would then be an Oregon rule and a federal rule. Federal and state law officers frequently work together and in many instances do not know whether their efforts will

result in federal or state prosecution or both. In these instances two different rules would cause confusion."

Although the Oregon Supreme Court distinguished the present case from the **Harris** decision, **Harris v. New York,** 401 U.S. 222 (1971), they nevertheless were free to so rule without review by the Supreme Court of the United States so long as the rule propounded by them was equal or more restrictive to the prosecution, as it certainly was, than the federal law requires, and so long as its decision was based upon reasonable arguable grounds. Those reasonable arguable grounds have been expressed by the Supreme Court of the United States in the dissenting opinion of the **Harris** case and in the majority opinion in **State v. Brewton,** 247 Or. 241, 422 P.2d 581, cert. denied 387 U.S. 943 (1967).

In **Ker v. California,** 374 U.S. 23, 10 LEd 2d 726, 83 S Ct, 1623, the following language appears,

> "The states are not thereby precluded from developing workable rules governing arrest, searches and seizures to meet the practical demands of effective criminal investigation of law enforcement in the states, provided that those rules do not violate the constitutional proscription of unreasonable searches and seizures and the concomitant command that evidence so seized is inadmissible

> against one who has standing to complain. Such a standard implies no derigation of uniformity in applying federal constitutional guarantees, but is only a recognition that conditions and circumstances vary, just as do investigative and enforcement techniques".

The State of Hawaii, whose Supreme Court refused to accept the **Robinson** decision in **State v. Kaluna,** ———**Haw**———, 520 P.2d, 51, 58 (1974) used the following language in the **Kaluna** case,

> "However as the ultimate judicial tribunal in this state, this court has final unreviewable authority to interpret and enforce the Hawaiian Constitution. We have not hesitated in the past to extend the protections of the Hawaii Bill of Rights beyond those texually parallel provisions in the Federal Bill of Rights when logic and the sound regard for the purposes of those protections have so warranted."

The **Kaluna** case was a search and seizure case where the State Constitution of Hawaii required in addition to the federal rules, that there be no governmental intrusions into the personal privacy of citizens. A violation of this provision of Hawaii Law in a search that may have been otherwise reasonable and in all respects reasonable under the **Robinson** case, was nevertheless reversed by the Hawaii Supreme Court with the explanation above. In **State v. Santiago,** 53 Haw. 254, 263, P.2d 657, 662 (1971) the following

language appears,

> "However this Court is the final arbiter of the meaning of the provisions of the Hawaii Constitution. Nothing prevents our constitutional drafters from fashioning greater protections for criminal defendants than those given by the United States Constitution, State v. Texeria, 40 Haw. 138, 142, 433 P.2d 593, 597 (1967)".

In the **Santiago** case the Supreme Court of Hawaii rejected the rule of **Harris** and held that confessions not admissible in the states case-in-chief due to inadequacies of **Miranda** warnings may not be used for impeachment. purposes.

In **People v. Norman,** 112 Cal. Rptr. 43, 49, 50, the following language appears,

> "So long as the state statutory or constitutional limitation on search is as strict or stricter than that imposed by the Fourth Amendment, no question of violation of Fourteenth Amendment rights can arise."

In **People v. Kelley,** Misc. 353 N.Y. S.2d, 111, 117 (1974) the following language appears,

> "It appears therefore that the Court of Appeals may not narrow Fourth Amendment protections further than the Supreme Court dictates, but there is no prohibition against the state through its highest appeallate court extending such protection. For these reasons, it is the opinion of this Court that Marsh is not replaced by Gustafson and Robinson and is still the law in New York. The principle of Marsh is fair and reasonable and equitable and was consistent with federal interpretation of the Fourth Amendment prior to Gustafson and Robinson."

Oregon's Constitution, Article I, Section 10, provides as follows:

> "No court shall be secret but justice shall be administered openly and without purchase completely and without delay and every man shall have remedy by due course of law for injury done him in his person, property or reputation".

Oregon's Constitution, Article I, Section 12 provides:

> "No person shall be put in jeopardy twice for the same offense nor be compelled in any criminal prosecution to testify against himself."

In the instant case the Supreme Court of the State of Oregon was well within their Oregon Constitutional interpretation whether or not the present case can be distinguished from that of **Harris v. New York,** supra.

ARGUMENT OF QUESTION TWO

The Bill of Rights protects individuals from wrongful state conduct. The Fourteenth Amendment and Fifth Amendment have been raised in this case by the State, who have requested in their Brief that the judg-

ment of the Supreme Court of the State of Oregon be reversed by the Supreme Court of the United States and remanded. Research has failed to disclose a single case where certiorari has been granted to the State in such circumstances and numerous cases found, including **Smith v. Indiana,** 191 U.S. 138, have maintained that a person raising a constitutional question in the Supreme Court of the United State must be a person who is personally effected by said interpretation of the State court or statute and must have a personal or real interest involved. In **Smith v. Indiana,** supra, an assessor appealed an adverse finding on a mandamus proceeding that required him to reassess County property. The Supreme Court of the United States held that he was acting in an official capacity under the laws of the state and had no personal interest that would cause him to be a proper party to raise such a question. This was true even though he was assessed costs personally in the original proceeding.

It is a firmly established principal of law that the constitutionality of a statute or ordinance may not be attacked by one whose rights are not adversely affected by the operation of the statute. This rule applies to all cases both at law and in equity and is equally applicable in both civil and criminal proceedings, **see 16**

CJS Constitutional Law, Section 76, and cases cited thereunder.

In **State v. Slusher,** 119 Or 141, 248 P 358, 359, a sheriff was contesting the constitutionality of a state statute and the following language appears,

> "The better doctrine supported by an increasing weight of authority is that a mere subordinate ministerial officer to whom no injury can result and to whom no violation of duty can be imputed by reason of him complying with the statute, will not be allowed to question its constitutionality, but that the constitutionality of the statute may be questioned by an officer who will, if the statute is unconstitutional, violate his duty under his oath of office or otherwise render himself liable by acting under a void statute."

This general rule of proper standing to raise constitutional questions certainly should be applicable in the United States Supreme Court. The appealing party is the State of Oregon through the Attorney General. The constitutional provisions that are being questioned are provisions designed to protect individuals from the State of Oregon. The proper party to such proceedings would, of necessity, be a "person" who is injured or is about to be injured from the state's interpretation.

Since **Georgia v. Stanton** (1867 U.S.) 6 Wall 50,

18 LEd 721, the rule appears to be the states have no general standing before the highest constitutional court to attack laws of the Federal Legislature or to litigate Federal Constitutional issues unless they are protecting their own state property rights that are directly affected by legislation of the congress or by other federal action, by legislative or other action of another state or by private party, see **Antieau Modern Constitutional Law,** page 664, 665, Section 15.25. In **Georgia v. Stanton,** supra, the State of Georgia under Article III of the U. S. Constitution attempted to obtain jurisdiction in the Supreme Court of the United States on a controversy between a state and citizens of another state. The following language of Justice J. S. Black appears in said case,

> "We admit that this Court has no authority to control the action of the legislative and executive departments or to require either of them by any mandate to keep within the limits of the law. No matter how clear it may seem to the judges that an act of congress has been passed which violates the constitution, such an act does not of itself afford any grounds of appeal to this court. We do not therefore, complain that congress has passed an unconstitutional act, but we complain that the defendants in this bill have done and threatened to do certain things injurious to the Plaintiff. If the defendants have not done those things and

> disclaim the intention imputed to them, we will have no case."

See also **Texas v. Interstate Commerce Commission,** 258 U.S. 158, 66 LEd 531, 42 S Ct 261; **New Jersey v. Sargent,** 269 U.S. 328, 70 LEd 289, 46 S Ct 122; **Massachusetts v. Mellon,** 262 U.S. 447, 67 LEd 1078, 43 S Ct 597; **Florida v. Mellon,** 273 U.S. 12, 18, 71 LEd 511, 47 S Ct 265; **New York v. United States,** 326 U.S. 572, 90 LEd 326, 66 S Ct 310 (1946); **Kansas v. Colorado,** 185 U.S. 125, 46 LEd 838, 22 S Ct 552; **Kansas v. Colorado** 206 U.S. 46, 51 LEd 956, 27 S Ct 655; **South Dakota v. North Carolina,** 192 U.S. 286, 48 LEd 448, 24 S Ct 269.

In the **Mellon** case, supra, the Court was concerned as to whether or not the State of Massachusetts had standing as representative of the citizens of the state and the following language appeared,

> "This Court can have no right to pronounce an abstract opinion upon the constitutionality of a state law. Such law must be brought into actual or threatened operation upon rights properly falling under judicial cognizance or a remedy is not to be had here."

and

> "Ordinarily, at least, the only way in which a state may afford protection to a citizen in such cases is through the enforcement of its own criminal statutes where that is appropriate or by opening

its courts to the injured persons for the maintenance of civil suits or action."

The State has instituted an appeal based on Amendment 5 and 14 as its basis for jurisdiction but the 5th and 14th Amendment of the Constitution of the United States are federal prohibitions against the state itself and run in favor of the criminal defendant. In its Brief, the State has at no point indicated that the State of Oregon was deprived in any of its constitutional rights under the Constitution, nor that the defendant was deprived of any of his constitutional rights under the Constitution, but they are seeking an abstract decision of the Supreme Court that would aid legal scholars to better interpret various federal cases that are in conflict with various state cases. It would appear likely that legal scholars all over the United States are waiting with bated breath for the words of the high court to end the confusion and give them an answer. However, the name of this case is the **State of Oregon v. William Robert Hass,** and it has been contended by the State of Oregon, that William Robert Hass is merely a small town burgler who has no real concern as to the question of power in the Courts or the various interpretations of state and federal cases. He is claiming no abuse by the state court, no violatoin of any of his constitutional rights

and, in fact, is blissfully contented to accept the final mandate of the highest court of the State of Oregon. To use his rights under the Fifth Amendment and the Fourteenth Amendment as a basis to reinstate his conviction is beyond the scope of the Supreme Court's jurisdiction, or in the very least violates the abstention doctrine noted in the **Sibron** case and explained in **Railroad Commission v. Pullman Co.**, 312 U.S. 496, 85 LEd 971, 61 S Ct 643 (1941).

ARGUMENT OF QUESTION THREE

The respondent would incorporate as its argument the opinion of the Supreme Court of Oregon differentiating between the **Harris** case and the **Hass** case.

The only argument of respondent not included in the Oregon Supreme Court's decision centers around the wording in the **Harris** case majority opinion, as follows,

> "It does not follow through Miranda that evidence inadmissible against an accused in a prosecutions case-in-chief is barred for all purposes, **provided of course, that the trustworthiness of the evidence satisfies legal standards"**, emphasis added and the following statement,
>
> "Petitioner makes no claim that the statements made to the police were coerced or involuntary".

By those two statements in the majority opinion

of the **Harris** case, the distinction in the instant case can readily be drawn. When a police officer who admittedly is aware of a defendant's constitutional privilege to have counsel present during interrogation and who so advises the defendant, purposely deprives the defendant of that counsel when it was actually sought, in order to incriminate the defendant further, then it appears very difficult to concede that the testimony of the police officer deserves such trustworthiness as to satisfy legal standards. The police officer has arrived at the point where it it more beneficial to him to violate purposely the defendant's constitutional rights and attempt to get the evidence in, than to honor his rights and lose the evidence. In the **Hass** case, any attorney would have been negligent in his responsibility towards the defendant unless he clearly and unequivocally had advised the defendant at the time that this problem arose, to discontinue incriminating himself and to make no further statements and to engage in no further cooperation.

The police officer's testimony was in direct contradiction to that of the defendant as to the defendant's conduct after refusal of his right to an attorney, and the officer's conduct in and of itself, was such as should have caused his testimony to be no more trust-

worthy than that of the defendant.

In the **Harris** case, the Petitioner made no claim that the statements made to the police were coerced or involuntary. In the **Hass** case, it is the defendant's position that a purposeful denial of constitutional rights by the police with knowledge of the defendant's rights would, as a matter of law, cause the statement or conduct to be coerced and involuntary.

CONCLUSION

Based upon the authorities cited herein and the reasons propounded the Respondent requests that Petitioner's appeal be dismissed and in the alternative that the mandate of the Supreme Court of Oregon be in all respects affirmed.

Respectfully submitted,

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